

BANK ISLAM MALAYSIA BHD

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v.

AZHAR OSMAN & OTHER CASESHIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J

B

[ORIGINATING/WRIT OF SUMMONS NOS:

D4-22A-395-2005, D4-22A-399-2005,

D4-22A-195-2006 & D4-22A-263-2006]

28 JANUARY 2010

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BANKING: *Islamic banking - Loan facility - Bai Bithaman Ajil - Determination of quantum of plaintiff's claim - Whether bank had legal right to claim for full sale price as stipulated in Property Sale Agreement - Doctrine of stare decisis - Whether there was binding precedent - National Land Code, ss. 257(1), 266(1)*

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There were two sets of appeal that went before the Court of Appeal relating to Bai Bithaman Ajil ('BBA') contracts in Islamic banking. They were heard together and decided by the Court of Appeal that a BBA contract was valid and enforceable. The cases were sent to this court for determination of the quantum of plaintiff's claim in the writs of summons, as well as the amount due under the originating summons. The proceedings before this court involved two writs of summons registered as D4-22A-263-2006 and D4-22A-195-2006 and two originating summons registered as D4-22A-395-2005 and D4-22A-399-2005 respectively. The plaintiff in each of these four cases was Bank Islam Malaysia Berhad ('BIMB'). Counsel for BIMB contended that in a BBA contract, the Bank had a legal right to claim for the full sale price as stipulated in the Property Sale Agreement ('PSA'). Accordingly, he argued that in an application pursuant to an originating summons, the court ought to grant an order for sale based likewise, on the full sale price, irrespective of a premature termination. The bases of the counsel's arguments were (i) that this court should honour and enforce the clear written terms of the contract and should not interfere with the intention of parties by imputing any other term. Since the parties had agreed as to the amount of sale price as stipulated in the PSA, the defendant was under a legal obligation to pay the full sale price, irrespective of when a breach occurred; (ii) by virtue of the doctrine of *stare decisis*, this court was bound by the decision of the Court of Appeal in *Lim Kok Hoe* which upheld and acknowledged the obligation to pay the full sale price under the PSA.

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A Held:

- (1) In cases of BBA contracts despite stipulating the full sale price as being payable, the Bank grants *ibrar* or rebate on a termination due to breach or for prepayment. The granting of *ibrar* by BIMB is in line with the practice of other Islamic banks. That being the case in an order for sale application the sum stipulated under s. 257(1)(c) National Land Code shall be the amount payable in the event that a customer intends to tender payment under s. 266(1) National Land Code. Under this section, if a chargor tenders payment to court of the amount due and payable before the conclusion of the auction, the Order for Sale ceased to have effect. The approach of the Islamic banks that deduct unearned profit as *ibrar* is consistent with the requirement of s. 266(1) NLC while at the same time facilitated cases of prepayment. (paras 9 & 10)
- (2) Whilst the Court of Appeal in *Lim Kok Hoe* held that a BBA contract in a way differed from conventional banking because it was a sale transaction, it could not however be regarded as a sale transaction simpliciter. The BBA contract is secured by a charge and concession as *ibrar* is given as a matter of practice to all premature termination. Despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or *ibrar* based on 'unearned profit.' In the decisions of *Affin Bank Bhd v. Zulkifli Abdullah*, *Malayan Banking Berhad v Marilyn Ho Siok Lin* and *Malayan Banking Bhd v. Ya'kup Oje & Anor*, when a BBA contract was prematurely terminated upon default by the borrower, the court did not allow the bank to enforce the payment of the full sale price in a premature termination. The court does not enforce payment of the full sale purchase price but intervene on equitable grounds, *albeit* based on different approaches. (paras 13, 14 & 18)
- (3) The purpose of this proceeding was to deal with what would be considered fair and equitable in the circumstances and to lay emphasis on what would be the better and appropriate approach in dealing with the plaintiff's quantum with particular reference to the manner of its determination while being mindful of the parties' position. In doing so, the bank should not be allowed to enrich itself with an amount which was not due while at the same time taking cognizance of the customer's right to redeem

his property. Therefore where the BBA contract was silent on issue of rebate or the quantum of rebate, by implied term, the bank must grant a rebate and such rebate shall be the amount of unearned profit as practiced by Islamic banks. (para 22)

- (4) Applying the doctrine of *stare decisis* to *Lim Kok Hoe*, this court was bound to hold that a BBA contract was a valid and enforceable agreement. However, there was no binding precedent by the Superior Court for this court to follow to enforce the sale price under the PSA at all costs. There was not a slightest suggestion in *Lim Kok Hoe* that the issue of quantum has been canvassed before the court. The very fact that the Court of Appeal sent the cases back to this court for determination of quantum, said it all. (paras 27 & 32)

[Order accordingly.]

Case(s) referred to:

- Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 HC (**refd**)
Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases [2009] 1 CLJ 419 HC (**refd**)
Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22 CA (**refd**)
Bank Islam Malaysia Berhad v. Adnan Omar [1994] 3 CLJ 735 HC (**refd**)
Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA (**refd**)
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC (**refd**)
Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA (**refd**)
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC (**refd**)
Hairul Hisham Salim v. Dato' Zainal Abidin Zin & Anor [2003] 2 CLJ 712 HC (**refd**)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC (**refd**)
Malayan Banking Bhd v. Marilyn Ho Siok Lin [2006] 3 CLJ 796 HC (**refd**)
Malayan Banking Bhd v. Ya'kup Oje & Anor [2007] 5 CLJ 311 HC (**refd**)
Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 4 CLJ 345 FC (**refd**)
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC (**refd**)
Young v. Bristol Aeroplane Co Ltd [1944] 1 KB 718 (**refd**)

A Legislation referred to:

National Land Code 1965, ss. 256(2), 257(1)(c), 266(1)
Rules of the High Court 1980, O. 83 rr. 3(3)(b), (c)

For the plaintiff - Oommen Koshy; M/s Skrine & Co (D4-22A-399-2005)

B *For the plaintiff - Oommen Koshy (Mohamad Zainal Abidin Ahmad with him);
M/s Suhaimi, Yahya & Co (D4-22A-395-2005)*

*For the plaintiff - Oommen Koshy (Aedyla Bokari with him); M/s Nassir Hafiz
Nazri & Rahim (D4-22A-195-2006 & D4-22A-263-2006)*

For the defendants - In person

C *Reported by Suhainah Wahiduddin*

JUDGMENT

Rohana Yusuf J:

D Introduction

E [1] There are two sets of appeal that went before the Court of Appeal relating to Bai Bithaman Ajil (“BBA”) contracts in Islamic banking. The first set of appeal involves 11 Writs of Summons and one originating summons. They were heard together and decided by the Court of Appeal on 26 August 2009 and reported in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22. The Court of Appeal held that a BBA contract is valid and enforceable and reversed an earlier decision of the High Court in *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases* [2009] 1 CLJ 419 HC. Subsequent thereto all cases involving BBA contracts that were heard together thereat were sent to this court for determination of the quantum of plaintiff’s claim. The quantum of the plaintiff’s claim in these writs of summons and the amount due **G** under the originating summonses had in fact been determined by me on 28 January 2010.

H [2] Another set of appeal came before another panel of the Court of Appeal on 20 October 2009. That panel followed its earlier decision and again the cases were sent to this court for determination of the quantum of plaintiff’s claim in the writs of summons, as well as the amount due under the originating summonses. The proceedings before me, which were actions in the second set of appeal, involve two Writs of Summons registered as **I** D4-22A-263-2006 and D4-22A-195-2006, and two Originating Summonses registered as D4-22A-395-2005 and D4-22A-399-2005 respectively. Pursuant to the order of the Court of Appeal, parties were notified to appear before the learned deputy registrar for case

management and all the cases were set to be heard together on a specified date. However, only the solicitors for the plaintiff were present on that date.

[3] The plaintiff in each of these four cases is Bank Islam Malaysia Berhad (“BIMB”). For the purpose of hearing before me on the issue of quantum, BIMB filed an affidavit for each of the cases stating the latest statement of account in support of its claim. On the day set for hearing, none of the defendants appeared, except Encik Azhar bin Osman, who is the defendant in the Originating Summons D4-22A-395-2005. He appeared in person. All the four cases are based on BBA contracts.

[4] Learned counsel for BIMB, Encik Oommen Koshy (Encik Aedyla Bokari with him) contended that in a BBA contract the bank has a legal right to claim for the full sale price as stipulated in the Property Sale Agreement (“PSA”). Accordingly he argued that in an application pursuant to an originating summons, the court ought to grant an order for sale based likewise, on the full sale price, irrespective of a premature termination. The bases of Encik Oommen Koshy’s arguments are two. First, he contended that this court should honour and enforce the clear written terms of the contract and should not interfere with the intention of parties by imputing any other term. Since parties had agreed as to the amount of sale price as stipulated in the PSA, the defendant is under a legal obligation to pay the full sale price, irrespective of when a breach occurs. Secondly, by virtue of the doctrine of *stare decisis*, this court is bound by the decision of the Court of Appeal in *Lim Kok Hoe* which, according to Encik Oommen Koshy, upheld and acknowledged the obligation to pay the full sale price under the PSA.

[5] Before I proceed to analyse the arguments of learned counsel, it would be appropriate for me to state here the practice of this court in determining the quantum of plaintiff’s claim under a terminated BBA contract generally, both in an application for order for sale as well as a claim for a judgment sum in a writ of summons. It is worth noting also that writing a decision on Islamic banking cases can be rather challenging because of the scarcity of precedent to refer to. Perhaps this is because Islamic banking in Malaysia is still in its stage of infancy, with just over 30 years in practice, as compared to over 250 years of conventional banking. It is made more difficult in these cases when there is no opposing counsel to argue the defendant’s case and elucidate the issues that

- A may cause injustice to the defendant. It is also my observation that typically the contract documents used in these transactions are, more often than not, a modified version of the standard banking document, which not surprisingly, made reading more arduous. Be that as it may, what I propose to do here is to set some of the practices and legal position, which to my mind is appropriate, given the existing set of laws, in determining the quantum of plaintiff's claim under BBA contracts.

Present Practice

- C [6] The nature of a BBA contract is well explained in the Court of Appeal's decision in *Lim Kok Hoe*, and I can do no better. In a typical BBA contract, the first transaction begins with a Property Purchase Agreement ("PPA"). As in the present case D4-22A-263-2006, *vide* the PPA the defendant sells his property to the BIMB for a sum of RM177,960 and almost simultaneously BIMB sells it back to him at a price of RM451,895.04 under the PSA. There are, depending on the circumstances, variations as to the manner in which a bank pays the purchase price under the PPA to the customer. In a case where the construction of the property is completed, the bank will pay by lump sum payment of the full purchase price. In other instances, payment may be made progressively, which usually depends on the stage of completion. Ordinarily the repayment by the customer under the PSA is on deferred payment basis by way of periodical instalments for an agreed tenure which may run to 20 years or more. Again depending on the terms agreed, payment of the instalments may commence immediately upon the initial payment or after payment by the bank of the full purchase price under the PPA. As security for the payment of the instalments by the customer under the PSA, a charge over the property is created in favour of the bank.

- [7] Upon default by the customer, the bank may enforce the charge by applying for an order for sale and simultaneously file a writ of summons for judgment sum. An application for an order for sale is made by way of an originating summons. Section 256(2) of the National Land Code, 1965 ("NLC") states that, an application for an Order for Sale, must be made in accordance with the law relating to civil procedure, namely, the procedures as laid down under the Rules of the High Court 1980, ("RHC"). O. 83 of the RHC provides for *inter alia*, the procedure for a sale of a charged property. Section 257(1)(c) NLC, requires an order for sale made by the court "shall specify the total amount due to the chargee at the

date on which the order is made ...” whilst under O. 83 r. 3 of the RHC, requires that there must be particularisation of the account between the chargor and chargee which includes “the amount remaining under the charge” (see O. 83 r. 3(3)(d)). Thus, an additional or supplementary affidavit would be required in an application for an order for sale for the purpose of specifying the amount due to the chargee at the date on which the order is made.

[8] In specifying the amount due, the issue which confronts a BBA contract is this. The PSA stipulates the sale price, the payment of which is by way of instalments for a specified tenure of the contract. The agreement is however silent on the amount due to the bank when the tenure of the BBA contract has not completed. The non completion may be due to prepayment or termination due to breach. Also, it is silent on the amount payable when the bank has not paid the purchase price in full under the PPA. What I have gathered thus far from cases involving Islamic banks that have come before me, which includes Hong Leong Islamic Bank Berhad, RHB Islamic Bank Berhad, Bank Kerjasama Rakyat Malaysia Berhad and Affin Islamic Bank Berhad, is this. When a customer wants to prepay under a BBA contract, the bank will issue a redemption statement. Usually the redemption statement will stipulate the amounts payable for prepayment at each monthly interval for period three months thereafter. The redemption statement usually states that, if prepayment is made at the end of January for instance, the redemption sum would be less than if a prepayment is made at the end of February and so forth. The redemption sum is computed based on when payment is due. The computation, as I understand it, is based on the full sale price under the PSA less the paid instalments. Since the tenure of the contract has not completed, the bank will further deduct as *ibrar* (a term used in Islamic banking for rebate) what it refers to as “unearned profit”. Unearned profit, as the name suggests, is the amount which has yet to be earned by the bank. I have been made to understand, from a testimony given by a representative of RHB Bank in another case, “unearned profit” is based on an Amortization table used by these Islamic banks. According to his testimony, the Amortization table is essentially an internal document in the form of a table that is used in the banking industry throughout the globe. It enumerates or tabulates the banking transaction and the particulars of which are as shown herein below. Adjustments are made to the amount in the table in the

- A** course of transaction, depending on whether the instalments are paid early or otherwise. What I would like to illustrate here is the method of computation used by the bank based on this table in determining the balance sale price and the rebate granted to customers. A word of caution is necessary in referring to this table.
- B** This table represents an ideal BBA transaction. In reality of a banking transaction, there may be late payment of instalment by a customer. Then the bank will have to readjust the respective figures in the table accordingly.

C Eg, for illustration purposes only

	Payment No.	Installment	Financing Amount	Unearned Profit/ Ibrar	Balance Selling Price
	0		100,000.00	48,912.97	148,912.97
D	1	1,128.13	99,517.70	48,267.14	147,784.85
	111	1,128.13	22,087.88	1,602.82	23,690.70
	112	1,128.13	21,102.40	1,406.17	22,562.57
	113	1,128.13	20,110.56	1,323.88	21,434.44
E	114	1,128.13	19,112.31	1,194.00	20,306.31
	115	1,128.13	18,107.62	1,070.57	19,178.19
	116	1,128.13	17,096.43	953.62	18,050.06
	117	1,128.13	16,078.72	843.21	16,921.93
	118	1,128.13	15,054.43	739.37	15,793.80
F	119	1,128.13	14,023.53	642.14	14,665.67
	120	1,128.13	12,985.97	551.57	13,537.54
	121	1,128.13	11,941.71	467.71	12,409.41
	122	1,128.13	10,890.70	390.58	11,281.29
G	123	1,128.13	9,832.91	320.25	10,153.16
	124	1,128.13	8,768.29	256.74	9,025.03
	125	1,128.13	7,696.79	200.11	7,896.90
	126	1,128.13	6,618.37	150.41	6,768.77
	127	1,128.13	5,532.98	107.66	5,640.64
H	128	1,128.13	4,440.59	71.93	4,512.51
	129	1,128.13	3,341.14	43.25	3,384.39
	130	1,128.13	2,234.59	21.67	2,256.26
	131	1,128.13	1,120.89	7.24	1,128.13
I	132	1,128.13	0.00	0.00	0.00

This table illustrates a BBA transaction where the customer sells to the bank *vide* a PPA an assets of the customer for a sum of RM100, 000. The bank sells back to the customer under the PSA for RM148,912.97, payable in 132 instalments of each RM1,128.13. The first column denotes the instalment numbers which is on monthly basis. As an example, if a customer defaulted on payment of instalment No. 112 in the first column, the balance selling price due to the bank will be RM23,690.70. This figure appears in the last column. If the sum is paid immediately, the bank will grant an ibrar by deducting the unearned profit of RM1,406.17 as shown in the “unearned profit” column. However, if the amount is not paid immediately, for example, it is only paid on the date when instalment No. 124 is due; the unearned profit that the bank will deduct as ibrar will be recomputed taking into account the non payment of the outstanding instalment from date of default to the payment date. It must be born in mind that the figure in the “unearned profit” column in the instalment number 124 does not automatically apply but need adjustment based on punctuality of instalment payment. In the event that no payment is made till the end of the tenure that is, when instalment No. 132 becomes due or thereafter, the bank would be entitled to receive the sum of RM23,690.70 with no rebate, as there would be no further unearned profit left to be deducted as ibrar. The balance sale price of RM23,690.70 would be the maximum amount that the bank could claim as there is no interest chargeable thereon after judgment is obtained. If I am permitted to state here, compared to conventional banks, Islamic banks’ claim will be capped to the sale price and no more. Needless to say, depending on the terms of the contract the bank may also be entitled to other ancillary charges due, including late payment charges.

[9] In an ongoing trial before me based on BBA contract, a witness from the BIMB testified that in all cases of BBA contracts despite stipulating the full sale price as being payable, the bank grants ibrar or rebate on a termination due to breach or for prepayment. The granting of ibrar by BIMB is in line with the practice of other Islamic banks. That being the case in an Order for sale application too the sum stipulated under s. 257(1)(c) NLC shall be the amount payable in the event that a customer intends to tender payment under s. 266(1) of the NLC. Under this section if a chargor tenders payment to court of the amount due and payable before the conclusion of the auction (that is to say, before the hammer falls), the order for sale ceases to have effect.

- A [10] From the above it may be said that the approach of the Islamic banks that deduct unearned profit as ibrar is consistent with the requirement of s. 266(1) NLC while at the same time facilitate cases of prepayment. Thus, in all application for order for sale before me, I have allowed the sum specified under s. 257(1)(c)
- B NLC, to be the sum due and payable at the date on which the order is made; based on the total sale price less the amounts paid under the instalments and further deducting the unearned profit of the bank computed at the day on which the order for sale is made, as illustrated in the Amortization table above. In taking this
- C approach, I am mindful that the law strictly requires the bank when applying for an order for sale to state the amount due on the date on which the order for sale is made. In a case where the tenure of the contract has completed there would be no further unearned profit to be deducted and the full sale price would be the amount due and payable. Even if it is long overdue, the amount due and payable remains the same because the sale price under the PSA does not attract any interest.

- E [11] Similar approach is taken by this court in proceedings under a writ of summons. Judgment is entered on the quantum of plaintiff's claim based on full sale price under the PSA less the amounts paid under instalments at the time the writ was filed or thereabout. This sum will further be deducted by the amount of unearned profit (if any) on the date of realisation as ibrar. This is
- F because, unlike the application for an order for sale, there is no requirement for the plaintiff to state the amount due and payable on the date of judgment.

Argument By The Bank

- G [12] For the banks, often it is argued that the court must enforce the full sale price, irrespective of the time, breach occurs. In other words, it is not the business of the court to interfere with written terms of the contract since the customer has agreed to pay the full sale price upon default. This argument is premised on the
- H underlying presumption that a BBA contract is a sale transaction and not a loan transaction. Hence, a sale price must be met at all cost. It is also the belief of the proponent of this argument that, by inserting a rebate clause in the agreement it will create uncertainty on the sale price and the gharar operates. Besides, since
- I it is a sale agreement, the sale price does not change, lest it will not reflect the transaction as a true sale. As a matter of practice however, the bank in all instances will grant a rebate at its discretion.

[13] With due respect, I find this argument untenable. Whilst it is true that the Court of Appeal in *Lim Kok Hoe* held that a BBA contract in a way differs from conventional banking because it is a sale transaction, it cannot however be regarded as a sale transaction simpliciter. The BBA contract is secured by a charge and concession as *ibrar* is given as a matter of practice to all premature termination. Further, it is not a simple sale because even if the bank does not make payment of the full purchase price under PSA the bank would still be entitled to claim the amount already paid. Whereas in a simple sale if the first leg of the transaction fails, the bank's right to the amount paid will not *ipso facto* accrue since the sale was never completed.

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[14] If we were to take Encik Oommen Koshy's argument to the extreme, is this court expected to order that a full sale price be paid by a customer even if the bank had not made payment of the full purchase price under the PPA? That is quite difficult to reconcile and surely cannot be so. In fairness the bank cannot be allowed to argue that a sale transaction must be adhered strictly to the letter only on the part of the customer. Why a bank should insist on payment of the full sale price and thereafter as a matter of practice grant a rebate to the customer simply to show that it is a sale transaction may have its purpose but to place the customer in such a precarious position is quite something else, particularly when such grant is at the bank's absolute discretion. From the practice of the bank it is clear that the insistence on enforcing payment of the full sale price appears to be merely an attempt to adhere to written text but I doubt if such appearance achieve its purpose. This is because, despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or *ibrar* based on "unearned profit".

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[15] According to Encik Oommen Koshy's argument also, the notion of enforcing payment of the full sale price followed by the grant of rebate or *ibrar* at the absolute discretion of the bank is in line with the spirit of a sale transaction. When questioned as to how a customer would then know what the amount of rebate would be, he suggested that, if there is surplus in the amount received from an auction, the bank would be obliged to refund to the customer the surplus from the proceeds. It is unclear what is meant by surplus. If surplus means an amount over and above the sale price, there is no reason for the bank to withhold the same. The bank must refund such surplus as retaining it amounts to

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- A unjustified enrichment on the part of the bank. Surplus must therefore mean the amount over and above the sum due to the bank and this amount may be refunded at the discretion of the bank. In other words, he suggested that, though rebate is always granted, it not a matter of right that the customer is entitled to it.
- B Any aggrieved customer, according to Encik Oommen Koshy also, can always bring an action to the Court for determination, as to whether he is entitled to a rebate or the amount of rebate is correct.
- C [16] Ingenious as this argument may be, regrettably I differ in my view. I dread to imagine that such a day would come because if a customer were to seek for a determination as suggested, then what would be the contractual terms upon which the court is to determine. This is particularly so, since it is also Encik Oommen
- D Koshy's argument that the court ought not to interfere. Even if as a last resort, justice demands equitable interference, the court would have little choice but to fall back on generally accepted practice of Islamic banks. That being so, I simply cannot appreciate, let alone understand, why a customer must go through such an excruciating
- E process when at the end of the day he comes to the same position namely, that in determining the correct amount of rebate, the court would apply what would be the generally accepted practice of Islamic banks. In other words the approach to be taken then would be the same approach taken by this court here and now. Further, it must
- F be said that Encik Oommen Koshy's suggestion would simply add to the burden already suffered by the aggrieved customer in terms of time and expenses, which this court should not condone, particularly since the issue could be resolved at this proceeding.
- G [17] Thus far, there are a few decisions of the High Court that relate to the quantum of plaintiff's claim in BBA contract. The first of such cases is, *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 HC. In that case it was held that the bank cannot claim the full sale price of the property in the event of default by the customer. The learned judge in that case allowed the balance due
- H on the date of judgment by computing the profit on a per day basis that is due to the bank until full settlement. The court took an approach of determining the bank's profit per day and allowing the same up till date of realisation. This case was later followed by *Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796 HC.
- I The High Court in *Malayan Banking Berhad* did not allow the full sale price to be the amount stipulated for an order for sale but

instead follow Affin Bank's approach. Further to that, the court ruled that it would not be equitable to allow the bank to recover the full sale price as defined in the instrument when the tenure of the facility was determined prematurely. In *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311, the High Court also did not allow the plaintiff to enforce payment of the full sale price stipulated in the application for order for sale but instead ordered the bank to put up an affidavit to indicate the amount of rebate to be granted before allowing an order for sale. This is because, His Lordship Hamid Sultan Abu Backer JC (as he then was) was of the view that Shariah banks is not a charitable institution and are entitled to earn profits out of their investment and when there is default it should adjust its profits according to the facts and justice of the case as required under the Sharia principles and practice.

[18] In all the above decisions, when a BBA contract is prematurely terminated upon default by the borrower, the court did not allow the bank to enforce the payment of the full sale price in a premature termination. The underlying principles which come to fore, derived from these decisions is clear. The court does not enforce payment of the full sale price but intervene on equitable grounds, *albeit* based on different approaches. I am doing the same for the following reasons.

[19] In my view, if I were to grant an order for the full sale price in an order for sale application, it will defeat the requirement of s. 266(1) of the NLC. I am guided by the decision of the Federal Court in *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345. Section 266 NLC is designed out of concern to protect the chargor. As held by the Federal court in that case it has the objective of protecting the chargor who is on the brink of having his property sold at an auction to know exactly where he stands in terms of the amount of repayment in order to give him the opportunity to redeem his position under s. 266 NLC. If I were to follow Encik Oommen Koshy's argument, it would mean that when a customer wants to tender payment under s. 266(1) NLC he will have to fork and pay the bank the full sale price and then wait at the mercy of the bank for a rebate. Even in a situation when the bank did not pay the full purchase price under the PSA, the burden lies on him to tender the full sale price under the PSA. Thereafter, he will be kept wondering if he is entitled to any rebate and how much (if any). If the customer eventually receives a rebate but feels that it is insufficient, he will have come

A to court for determination. Surely, that cannot be the intention of s. 266. Regretfully, I must say that in such a scenario, the protection intended by s. 266 will be rendered meaningless.

B [20] The practice of the banks in deducting the unearned profit as ibrar is not ignoble. In the same breath, it is inconceivable how stipulating the terms of the rebate will be repugnant to Sharia. The latter however creates unnecessary anxiety in customers. For that and other reason stated herein, I have, for the purpose of determining the quantum of claim, taken an approach to enforce an implied term of Islamic banking practice in the case before me. In this respect, I am guided by the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503. In *Sababumi Zakaria Yatim FCJ* (as he then was) stated in that case that the court may infer an implied term from evidence that the parties to a contract must have intended to include it in the contract, though it has not been expressly set out in the contract. Therefore when an Islamic bank practices granting of rebate on a premature termination, it creates an implied term and legitimate expectation on the part of the customer. Accordingly it is only proper that such expectation and practice be read into the contract.

F [21] Learned counsel for the plaintiff also contended that the term “unearned profit” is rather alien to Islamic banking contract as it is not in tandem with Sharia practice. I am not so clear what is meant by that because from the practices of Islamic banks that I have come across, the banks confirm that deduction of the unearned profit is a common practice and “unearned profit” is an accepted term. Terminology *per se* cannot be made a reason not to follow an approach that has well been received by the banking industry. To my mind using the terminology ibrar with no interpretation or explanation is indeed more alien to the bank’s customers. Ibrar is merely an Arabic term which means a rebate. The rebate to be granted is in fact based on the unearned profit of the bank. It is for that reason that I am more comfortable using the term “unearned profit” as it is capable of being commonly understood in the banking circle, as it is based on the Amortisation table. It would also be easily explained and capable of being understood by the customers as well. Besides, in my view using Arabic terminology *per se* does not make any transaction a Sharia transaction.

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[22] I must vehemently stress that the purpose of this proceeding is to deal with what would be considered fair and equitable in the circumstances and to lay emphasis on what would be the better and appropriate approach in dealing with the plaintiff's quantum with particular reference to the manner of its determination while being mindful of the parties' position. In doing so, the bank should not be allowed to enrich itself with an amount which is not due while at the same time taking cognisance of the customer's right to redeem his property. Therefore where the BBA contract is silent on issue of rebate or the quantum of rebate, by implied term I hold that the bank must grant a rebate and such rebate shall be the amount of unearned profit as practiced by Islamic banks.

[23] That said, this issue in fact could have been easily resolved. The legal documentations used by Islamic banks should have addressed the peculiarity of Islamic banking transaction, instead of adopting a cut and paste approach of the conventional banking documents. If the documents of the banks had in fact specified a formula of rebate or ibrar, it will demystify the intricacies of a BBA transaction. It will be easily understood by the customer who would then not be put in the dark as to what is ibrar and what would be the amount of ibrar he should be receiving. In that way, the court need not have to interfere with the terms of the agreement or to add implied terms as I am now doing.

Stare Decisis

[24] Encik Oommen Koshy also contended that this court should enforce the full sale price instead of adhering to the present practice for another reason. He argued that, following the doctrine of *stare decisis*, this court is bound by the decision of the Court of Appeal in *Lim Kok Hoe* which had given full acknowledgement of the right of the bank to enforce payment of the full sale price under the PSA. The basis of his contention is as follows. The Court of Appeal in *Lim Kok Hoe* referred to the cases of *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735, *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, and *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625. All these cases are based on BBA contracts which according to the learned counsel were upheld by the Superior Court. In all of them the full sale price has been allowed.

A [25] Before I deliberate on the issue of *stare decisis*, it would be
useful to appraise ourselves on the application of this doctrine. *Stare*
B *decisis*, according to *Oxford Dictionary of Law* 5th edition literally
means “to stand by things decided.” This is the maxim which
underlay the basis of the doctrine of binding precedent. It is
C necessary to abide by former precedent when the same points arise
again in litigation. In other words, it is to stick with what has been
decided. It is axiomatic that the principle of *stare decisis* operates on
the basis that “like cases should be decided alike”. The application
of this doctrine in England is found in *Young v. Bristol Aeroplane Co*
D *Ltd* [1944] 1 KB 718. In that case the Court of Appeal held that
the House of Lord’s decision binds the Court of Appeal and that
the court is bound by its own earlier decisions except for three
situations namely:

- D (i) the court is entitled to decide which of the two conflicting
decisions of its own to follow;
- (ii) the court can refuse to follow a decision of its own which,
though not expressly overruled, cannot, in its opinion, stand
E with a decision of the House of Lords; and
- (iii) the court is not bound to follow a decision of its own if it is
satisfied that the decision was given *per incuriam*.

Per incuriam refers to a judgment of a court which has been decided
F without reference to a statutory provision or earlier relevant
judgment. A judgment *per incuriam* need not be followed as
precedent. A lower court therefore, is free to depart from an earlier
judgment of a superior court where that earlier judgment was
decided *per incuriam*. However, ordinarily in the common law
G jurisdiction, the *ratio decidendi* of a judgment must be followed and
is said to be binding on the court below.

[26] The same principle was also adopted by the courts in
Malaysia. In *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, the
H Federal Court referred to *Young v. Bristol Aeroplane Co Ltd* [1944]
1 KB 718 and held that the doctrine of *stare decisis* dictates that a
court, other than the highest court, is obliged generally to follow
the decisions of the courts at a higher level or at the same level.
In *Dato’ Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006]
I 1 CLJ 577 the Federal Court finds that this doctrine has attained
to status of immutability and judicial hierarchy, and must be

observed to avoid uncertainty in the law. In *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 the Federal Court states that it is necessary for each lower tier in the court structure to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in this duty. In *Hairul Hisham Salim v. Dato' Zainal Abidin Zin & Anor* [2003] 2 CLJ 712, the court observes that, "the principle of *stare decisis* encapsulates the doctrine that a *ratio decidendi* of a superior court must be followed and is binding on the court below". The *ratio decidendi* of a case can be defined as the principle of law on which the court reaches its decision. It has to be deduced from the facts and the reasons that the court gives for reaching its decision as well as the decision itself.

[27] Coming back to the present case, the pertinent question to be asked is what then of the Court of Appeal decision in *Lim Kok Hoe* that binds this court, bearing in mind that under the doctrine of *stare decisis* that binding precedent is the *ratio decidendi*. It must be noted at the outset that the decision of the Court of Appeal in *Lim Kok Hoe* revolves around the issue of validity and enforceability of BBA contracts. Having deliberated on the arguments of counsel, the Court of Appeal upheld the validity of BBA agreement as enforceable contract. The reasons are stated in the judgment of His Lordship Mohd Raus JCA (now FCJ) at p. 23. Applying the doctrine of *stare decisis* to *Lim Kok Hoe*, this court is bound to hold that a BBA contract is valid and enforceable agreement. In fact, the Court of Appeal did not make any finding on the issue of quantum of claim. The way I see it, it was not raised at the Court of Appeal and it is for that reason that the cases are sent down for the quantum of claim to be determined.

[28] Encik Oommen Koshy in his submission contended that in *Lim Kok Hoe* the Court of Appeal referred with approval, the earlier decisions in *Bank Islam Malaysia Bhd v. Adnan Omar* [1994] 3 CLJ 735, *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, and *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625. According to him all these decisions involve the decisions of the High Courts which were upheld by the superior court. The decisions ultimately, according to him, tantamount to the superior court acknowledging the right to enforce payment of full sale price in a BBA contracts.

A [29] I cannot agree with that argument. This is because, if I were
to apply the doctrine of *stare decisis*, only a *ratio decidendi* of a
superior court decision will bind the lower tier. By merely citing all
these decisions with approval it cannot be said that the Court of
Appeal adopts the decision of these cases in toto. It would be
B indeed necessary to analyse what, the reference to all these cases
entail.

[30] After a careful scrutiny of the cases I find that none of the
decisions has established the *ratio decidendi* suggested. In *Bank Islam*
C *Malaysia Bhd v. Adnan Omar* the bank sought for an Order for Sale
based on BBA contract for the full sale price of RM583,000. The
case particularly revolves on the issue of non-compliance of O. 83
of RHC. It was argued that, O. 83 r. 3(3)(c) requires a claim of
interest which the bank failed to specify and comply. The court
D held that there is no question of interest because of Islamic nature
of transaction and thus the failure to comply with O. 83 is not
fatal. The finding of the High Court was accordingly upheld in an
unreported decision of the Supreme Court as mentioned in *Lim Kok*
E *Hoe* at p. 39. Since there is no report on the Supreme Court
decision of this case, I do not have the benefit of reading the
ground of decision of the Supreme Court nor the grounds of appeal
in the case. Thus, though the effect of the decision of the Supreme
Court decision in *Adnan Omar*, results in the sale price being
granted in full by the court, nevertheless it is not the *ratio decidendi*
F of that decision. In *Datuk Hj. Nik Mahmud Nik Daud v. Bank Islam*
Malaysia Berhad the Court of Appeal enforces a BBA contract and
held that the BBA contracts do not transgress the Malay
Reservations Enactment 1930 of Kelantan.

G [31] In *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee*
Corporation Sdn Bhd [2003] 1 CLJ 625, the Court of Appeal enforces
a BBA contract. Abdul Hamid Mohammad JCA (as he then was)
in that case states that “though the facility given by the appellant
to the respondent was an Islamic banking facility. But that did not
mean that the law applicable in this application was different from
H the law applicable if the facility was given under conventional
banking”. This remark cannot be taken literally. It cannot be taken
to mean that the law of contract which recognizes the sanctity of a
contract and the right to enforce the contract to its letter, as a *ratio*
I *decidendi* that the sale price is enforceable. Reading it contextually,
the observation is made by His Lordship in that case to show that

the Islamic banking contract is subject to the same law and legal system as any banking contract. It is true that the Court of Appeal in *Lim Kok Hoe* acknowledges these cases which ultimately resulted in granting and enforcing payment of the full sale price under the PSA, however none of the cases had in the judgment treated it to be the *ratio decidendi* of the decision.

[32] In fact to my mind, it is apparent from *Lim Kok Hoe*'s decision that the reference made by the Court of Appeal to all these cases is to reinforce its decision in upholding the validity and enforceability of BBA contracts. This is clear at p. 39 of the judgment when the Court of Appeal states that "it is clear that the validity and enforceability of BBA contract had been ruled by the Superior Courts". Hence applying the doctrine of *stare decisis* it is binding on Court of Appeal in *Lim Kok Hoe* to follow the Superior Court. I am not able to find any affirmation on the quantum to be enforced in a BBA contract by the Superior Court. Thus, I am clear that there is no binding precedent by the Superior Court for me to follow to enforce the sale price under the PSA at all costs. There is not a slightest suggestion in *Lim Kok Hoe* that the issue of quantum has been canvassed before the court by counsel. Furthermore, by the very fact that the Court of Appeal sent the cases back to this court for determination of quantum, says it all.

[33] In conclusion, for the reasons adumbrated above, I hereby allow the plaintiff's claim with costs, in the Writ of Summons Suit No. 22A-263-2006 for the outstanding sum of RM391,634.66 and in Suit No. 22A-193-2006 for the sum of RM190,476.54. These judgment sums are subjected to deduction of the unearned profit by the plaintiff (if any) upon full realization.

[34] As for the originating summons, a new hearing date of 22 February 2010 is fixed for the plaintiff in the Originating Summons No. D4-22A-395-2005 in order for BIMB to file supplemental affidavit to state the outstanding sum, after deducting the unearned profit due to be deducted, on the date the order for sale is to be obtained. At the request of BIMB, Originating Summons No. D4-22A-399-2005 is hereby struck out.

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